No. 16571

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION and WELFARE,

Defendant and Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.
Jurisdiction.

The Appellant, Louie Miller, commenced his action against the Appellee, Arthur S. Flemming, Secretary of Health, Education and Welfare, in the United States District Court for the Southern District of California, Central Division, designated Civil Action No. 1174-58BH, on December 16, 1958.

Appellant's action involved a claim for old-age insurance benefits under the Social Security Act and was brought in the said United States District Court pursuant to and by authority of the provisions of Section 405(g), Title 42, United States Code [Section 205(g) of the Social Security Act, as amended].

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment for the Appellee given in said action pursuant to and by authority of the provisions of Section 1291 of Title 28, United States Code.

II.
Laws and Regulations Involved.

[The Appellant has conceded, both in the trial court and by implication on this appeal, that he has no valid cause of action if the Appellee's decision that he was an employee of the City of Los Angeles, rather than an independent contractor therewith, is entitled to judicial affirmance. Therefore, it is unnecessary to discuss the statutory and regulatory provisions which deny old-age insurance benefits to the Appellant as an employee.]

The Social Security Act, as amended, Section 405(b), Title 42, United States Code:

> "(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Upon request by any such individual . . . he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. . . . The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or

other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. . . .".

The Social Security Act, as amended, Section 405 (g), Title 42, United States Code:

"(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions".

The Social Security Act, as amended, Section 405 (h), Title 42, United States Code:

"(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals

who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. . . .".

The Social Security Act, as amended, Section 405 (1) Title 42, United States Code:

"(1) The Secretary is authorized to delegate to any member, officer, or employee of the Department Health, Education, and Welfare designated by him any of the powers conferred upon him by this section. . . .".

The Social Security Act, as amended, Section 410(k) Title 42, United States Code:

"(k) The term 'employee' means—

"(2) Any individual who, under the usual commonlaw rules applicable in determining the employer-employee relationship, has the status of an employee;"

The Social Security Act, as amended, Section 418(b), Title 42, United States Code:

"(b) For the purposes of this Section—

"(3) The term 'employee' includes an officer of a State or political subdivision."

The Charter of the City of Los Angeles, Section 508A:

"A. Every member shall be retired on the first day of the calendar month next succeeding that month in which he shall have reached the age of seventy (70) years . . .".

The Charter of the City of Los Angeles, Section 508C(2):

"C. . . .

"(2) . . .

"No person who shall have been retired from the service and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any service rendered as an officer or employee of said City, except for service rendered as an election officer, or as an officer elected by the electors of said city".

Regulations of the Department of Health, Education and Welfare, Section 404.1004(c), 20 CFR Part 404 [1959 Cumulative Supplement, page 207]:

"(c)(1) Every individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

"(2) Generally such relationship exists when the person for whom services are performed has a right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct and control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other

factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, and furnishing of a place to work, to the individual who performs the services. In general, if the individual is subject to the control or direction of another merely as the result to be accomplished by the work and as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common-law rules . . .

"(3) When the relationship of employer and employee exists under the usual common-law rules will in doubtful cases be determined upon an examination of the particular facts in each case".

California Labor Code, Section 3351 (West's Annotated California Codes, 1955 Ed., Vol. 44, page 511):

"3351. 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

. . .

(b) All elected and appointed paid public officers".

California Labor Code, Section 3353 (West's Annotated Calif. Codes, 1955 Ed., Vol. 44, page 563):

"3353. 'Independent contractor' means any person who renders services for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished".

III.

Summary of Argument.

A.

THE QUESTION WHETHER THE APPELLANT IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR IS SUFFICIENTLY FACTUAL TO FALL WITHIN THE RULE THAT FINAL DECISIONS BY THE APPELLEE AS TO ISSUES OF FACT MUST BE JUDICIALLY SUSTAINED IF SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

B.

THE APPELLEE'S DECISION THAT THE APPELLANT WAS AN EMPLOYEE OF THE CITY OF LOS ANGELES, RATHER THAN AN INDEPENDENT CONTRACTOR THEREWITH, IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, AND, THEREFORE, MUST BE AFFIRMED.

C.

EVEN ASSUMING, ARGUENDO, THAT SAID QUESTION IS ESSENTIALLY ONE OF LAW, APPELLEE'S DECISION THAT THE APPELLANT WAS AN EMPLOYEE OF THE CITY OF LOS ANGELES IS LEGALLY SOUND AND, THEREFORE, SHOULD BE AFFIRMED.

IV.

ARGUMENT.

A.

The Question Whether the Appellant Is an Employee or an Independent Contractor Is Sufficiently Factual to Fall Within the Rule That Final Decisions by the Appellee as to Issues of Fact Must Be Judicially Sustained if Supported by Substantial Evidence in the Record.

The question whether the relationship of "master and servant" existed is one of fact for the jury where the evidence is conflicting *or more than one inference can be drawn from the evidence.*

57 C.J.S. Section 617(2), page 409, note 45 and cases cited.

The worker's status as employee or independent contractor is a question of law where the contract claimed to have established the relationship is in writing, where the facts pertaining to the contract and the relationship with the person involved are not in dispute, *and where but one reasonable inference can be drawn therefrom.*

57 C.J.S. Sec. 617(2) pp. 410-411, notes 46, 47, 50, and cases cited.

It is conceded that many cases have said that where the relationship has been formulated in a written contract, which purports to confer the status of independent contractor, the question is usually one of law.

57 C.J.S., Sec. 617(2), pp. 410-411, notes 46, 47, 50 and cases cited;

Batt v. San Diego Sun Publishing Co. (1937), 21 C. A. 2d 429, 69 P. 2d 216;

McReynolds v. Oklahoma Turnpike Authority (S. Ct. Okla. 1955), 291 P. 2d 341;

Stevens v. Frump (1949), 132 W. Va. 66, 52 S. E. 2d 181;

Connolly v. Peoples Gas Light Company (1913), 260 Ill. 162, 102 N. E. 1057.

However, an analysis of these decisions shows that it is only where the circumstances justify a conclusion that the contract embodied the real relationship between the parties, that the foregoing rule applies. This is clearly shown by the language in the *Batt* and *McReynolds* opinions, *supra.*

In *Batt* the court said: "In the instant case the conclusion is inescapable that at the time of the accident in question here Cottrell was performing duties assumed by him under his written contract with appellant and no other. That being so, *and that contract being free from ambiguity and clear in its terms,* the interpretation to be put upon it and the relationship created by it between appellant and Cottrell, becomes one of law alone for decision by a court unhampered by the implied findings of the jury." (emphasis supplied). 21 C. A. 2d 437.

Here, however, we have a contract which is general and vague and which does not purport to set out in detail the specific duties to be performed by the Appellant. [R. T. 84-86].[1] It certainly is not "free from ambiguity and clear in its terms" since it failed to define adequately the conditions of work or the quantity and quality of the investigative reports the Appellant was required to pre-

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[1]Since Appellant has referred to the transcript of the administrative proceedings by the symbol "R. T.", Appellee will do likewise in the interest of consistency.

pare. Moreover, it is especially significant that the contract herein concerned a person who for 50 years had been an employee of the City of Los Angeles and who in later years had served as Director of the Bureau of Street Maintanance, and that it was executed immediately before his compulsory retirement. [R. T. 22, 24] When all these facets are viewed in light of the prohibition in the City Charter of Los Angeles against payment of any compensation (subject to a few non-relevant exceptions) to a retired employee who continues to work for the city thereafter [R. T. 11-13], it is wholly logical to infer that the primary purpose of this contract was to retain the services of the Appellant as hitherto rendered and that he was designated as a "consultant" therein only because he could not have been paid otherwise.

We do not mean to imply that either the city officials or the Appellant was engaged in any immoral activity. No doubt, all concerned believed that the city would benefit by retaining the services of such an experienced person, and they may even have believed that execution of the contract removed the case from the bar of the Charter. However, it was certainly within the prerogative of the Appellee to weigh these factors and to conclude that, whether or not such an arrangement was valid under the Charter of Los Angeles, the actual relationship between the Appellant and the City continued to be one of employer and employee within the meaning of the Social Security Act.

The *McReynolds* case, *supra,* strongly suggests that under the circumstances here present the Supreme Court of Oklahoma would have ruled that the question was one of fact, despite the existence of a contract. The court stated: "The general rule in this jurisdiction is that

where a contract of employment is in writing the question of the relationship created thereby is one of law for the trial court . . . However, we recognize and apply two further principles, viz.: whether one is an agent, servant or employee depends upon the facts peculiar to each case; and, although under a written contract the question whether the relation of employer and independent contractor ordinarily is a question of law for the court, *a contract which purports to create such relationship will not protect the employer when it may be inferred from facts and circumstances revealed by the evidence that, despite provisions of contract, the real relation was that of master and servant".* (emphasis supplied). 291 P. 2d 345.

The actual holding in the *McReynolds* case was that, despite the existence of a written contract, the question whether the Appellant was an employee or an independent contractor should have been left for the consideration of the jury because of conflicting elements. We submit that it would be difficult to find a case which offers stronger reasons for concluding that the contract was designed to conceal the true relationship between the parties than the one at bar.

Again, it was held in *Arkansas Fuel Oil Company v. Scaletta* (1940), 200 Ark. 645, 140 S. W. 2d 684, that since there was evidence that the "lease contract" was executed as a "cover-up agreement" in order to conceal the true master and servant relationship between the parties to the contract, the question of that relationship was for the jury. Certainly, this seems to be sound law since the mere existence of a contract should not preclude the finder of fact from determining whether it really embodies the actual relationship between the parties.

What is all important here is that Section 508A of the Charter of the City of Los Angeles, which was controlling with respect to the future services of the Appellant, whether as employee or independent contractor, required that he be retired at the age of seventy. [R. T. 11-12]. Said Charter, under Section 508C(2), also specifically provided: "No person who shall have been retired from the service and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any service rendered as an officer or employee of said city, except for service rendered as an election officer or as an officer elected by the electors of said city." [R. T. 13]. Faced with this prohibition, it is very easy to understand why the contract in question was drawn, why it is so general and vague, and why it devotes so little attention to the quantity and quality of the Appellant's services. Presumably, it was understood that he would continue to do virtually the same type of work he had previously performed for so many years. To be sure, he was now called a "consultant" and perhaps he was to circulate more among the various supervisory officials, but essentially, as he himself admitted [R. T. 28], he was doing the same work in the same way. Under these facts, the finding of the Appellee that he was not entitled to benefits should not be reversed.

On page 5 of his brief the Appellant contends that whether an individual is an employee or an independent contractor is an issue of law and that the rule that a finding of fact, if supported by substantial evidence, is conclusive is not applicable.

This contention is unsound, as is shown by the many authorities cited herein and in our trial briefs. Nor do the Appellant's own citations support such a doctrine.

Social Security Board v. Nierotko (1946), 327 U. S. 358, did not concern the question whether the respondent was an employee of an independent contractor but merely whether "back pay" awarded under the National Labor Relations Act should be treated as "wages" under the Social Security Act. The issue was one of statutory definition, and thus clearly and traditionally a question of law. There is nothing in *Nierotko* which conflicts in any way with the rule that ordinarily the question whether a person was an employee or an independent contractor is one of fact.

Carroll v. Social Security Board (7 Cir., 1942), 128 F. 2d 876, is likewise not in point since there again the question was not the status of the plaintiff as an employee or an independent contractor but whether he had an "employer" within the meaning of the Social Security Act. The court stated: "The situation presented, however, is so extraordinary that we doubt if it should or can be solved by the application of rules and theories relative to an ordinary situation. Certainly, it must be conceded that plaintiff was rendering service for someone. That he was not working for himself, and that he was not an independent contractor, we assume would also be conceded". 128 F. 2d 878.

Moreover, the court in the *Carroll* case expressly found that the decision of the Social Security Board that the plaintiff was not an employee was not supported by substantial evidence. The opinion says that: "While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was the employee of the bank within the meaning of the Act and entitled to its benefits. In so concluding we have not overlooked the statutory admonition which binds us to

accept the findings of the Social Security Board if supported by substantial evidence. The rule is not controlling, however, because the Board's decision, that plaintiff was not an employee within the terms of the Act, is without substantial support. Moreover, in our view, the rule has no application because the question presents an issue of law rather than of fact. It involves a construction of the Act." 128 F. 2d 881.

Thus, all that the *Carroll* case provides the plaintiff is a *dictum* that under the "extraordinary" facts there present the basic issue was one of law—and since the issue there was quite different from the issue here, this is, indeed, a fragile reed.

Even the California case of *Albaugh v. Morse Construction Co.* (1954), 125 C. A. 2d 126, cited on page 5 of Appellant's brief—which under the decision of this Court in *Matcovich v. Anglim, supra,* would not be controlling in any event—provides little aid to the Appellant. There, the employee-independent contractor question was actually at issue and the court did hold that, under the conditions present, it was a question of law. However, it first found that the contract was clear and unambiguous and that it embodied the true relationship between the parties. 125 C. A. 2d 130-131. As shown herein and in the Appellee's trial briefs, the contract in the instant case fails to meet these qualifications.

The Appellant himself reluctantly recognizes the foregoing distinction in saying: "This [*i.e.,* his contention that the employee-independent contractor question is one of law] is particularly true where there is a written contract of employment and the facts are not in dispute". Appellant's Brief, page 5. Had the Appellant been more accurate in his use of adverbs and said "only" instead of

"particularly," he would have made a fair statement of the law. This is shown by his own citations, as listed on pages 5-7 of his brief. Where the admitted facts reasonably admit of different conclusions, then the rule invoked by the Appellant certainly does not apply. As shown in the Referee's decision [R. T. 7-9] and on pages 22 through 24 of our trial Memorandum of Points and Authorities, there are substantial factors in the record which support the theory that the Appellant was an employee.

Appellee does not quarrel with the principle enunciated by the Supreme Court of the United States in *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U. S. 474, that the substantial evidence rule should be applied by weighing the record as a whole. Appellee argued this case upon that basis in the trial court and frankly listed the elements which reasonably could be regarded as supporting the theory that Appellant was an independent contractor. Appellee's Memorandum of Points and Auties, pp. 22-24. But even if it be conceded, *arguendo,* that the record contains substantial evidence to that effect, the Appellant cannot prevail. The *Universal Camera* rule certainly does not require that the decision of the administrative agency be supported by a *preponderance* of the evidence but merely by evidence that is substantial when viewed in the light of the entire record. In many cases, of course, there is "substantial evidence" in favor of each of two contrary conclusions. Indeed, that may be the situation here. However, to concede that the Appellant's position finds substantial support in the evidence in now way avoids the more cogent conclusion that the Appellee's decision is similarly supported. Therefore, the judgment of the trial court must be affirmed.

The Appellant seems to place great emphasis upon certain California decisions. However, as stated above, the Appellant's own brief shows that these cases merely support the principle that the employee-independent contractor question may become one of law where "from all the facts only a single inference and one conclusion may be drawn". Appellant's Brief pp. 6-7. Moreover, even if we assume, *arguendo,* that Appellant derives tangible support from local adjudications, that would not be conclusive of the question herein. The weight of federal authority holds that the Social Security Act, in order to achieve its national objectives, should be interpreted, whenever reasonably possible, in a uniform way throughout the states. Of course, such a result is possible only by considering the context of the Act as a whole, its legislative history, its basic objectives as revealed by said history, and by applying thereto the generally accepted principles of the common law, unfettered by local peculiarities.

This very Court, in *Matcovich v. Anglim* (9 Cir., 1943) 134 F. 2d 834, interpreted the Social Security Act in the foregoing spirit and held that whether a person is an "employee" within that Act must be determined under the general principles of the common law. The Court found support for this conclusion not only in the language of the Act but in what it conceived to be its broad purpose to "integrate state laws with the federal act and to bring all states into the cooperative venture". It reasoned that since the Act operates within states the governments of which do not participate in its system, it must be given a nationwide interpretation, notwithstanding the congressional intention that the federal and state acts should be closely coterminous. 134 F. 2d 835.

Proceeding from these principles, this Court ruled that a state court's interpretation of the California Unemployment Reserve Act to the effect that the proprietor of a dance hall was not the "employer" of taxi-dancers was not controlling under the Social Security Act. It found in the factual situation enough elements of control by the proprietor over the dancers to justify the district court's decision that he was an "employer" within the meaning of the Act.

On pages 9 and 10 of of his brief, Appellant seeks to distinguish the *Matcovich* decision by arguing that "in the instant case a written contract of employment was entered into between appellant and the City of Los Angeles which was intended to, and did, comply with the city ordinance, forbidding the employment of appellant as an employee of the City". However, no such distinction exists. The facts in *Matcovich,* as stated in the opinion of this Court, reveal that after the woman concerned had been licensed as a taxi-dancer by the Chief of Police she and the Appellant therein agreed in *writing* as follows: "This is to certify that ..... is hereby granted the privilege of engaging in dancing with patrons of the undersigned at..... in consideration of the payment to the undersigned of a portion of the money earned by her as mutually agreed upon.

"In granting this privilege, *it is the intent hereof that licensee* shall not become an employee of the undersigned *and that she shall not become subject to the control of the undersigned.*

"Licensee agrees to abide by all regulations established by the undersigned in the operation of his business". (emphasis supplied.) 134 F. 2d 835.

Despite said contractual assertion, this Court found that the dancer was an "employee" under the Social Security Act.

In other words, in *Matcovich,* as here, there was a written contract which purported to create an independent contractor relationship. Indeed, in some respects the *Matcovich* decision goes further in that the contract therein expressly declared that the "licensee shall not become an employee of the undersigned," whereas similar language does not appear in the instant contract; and in that the self-interest of the contracting parties in concealing the true relationship between them (avoidance of social security taxes, of dubious benefit to the dancer) was less compelling in *Matcovich* than here, where the interest of both parties was clearly served by adoption of the independent contractor fiction. Here, neither the City nor the Appellant had any reasonable alternative but to invest the Appellant with the cloak of a "contractor" once it was decided that his services should be retained by the City for a year after his compulsory "retirement."

Nor is Appellant correct in contending that the decision of this Court in *Folsom v. Pearsall* (9 Cir., 1957), 245 F. 2d 562, modified the *Matcovich* doctrine. The two cases have very little in common, as is indicated by the fact that the *Matcovich* case was not even mentioned in the *Pearsall* opinion. We do not believe that this Court is wont to modify or restrict one of its own decisions without even a cursory bow thereto.

In *Pearsall* the basic issue presented was clearly one of law, in the traditional sense. There this Court affirmed a district court decree reversing an administrative decision that the Appellee was not entitled to benefits because she had "remarried," within the meaning of that term as used

in the Social Security Act. The Court reasoned that statutory construction is a legal function and that courts may examine the construction given by an administrative agency in order to determine its validity or invalidity; that the term "remarried" in the Social Security Act should be interpreted according to the context of the law; and that because said Act does not define that term, its meaning must be determined by state law. 245 F. 2d 565.

That the *Pearsall* problem was quite different from the one herein is clearly shown by the language of the Court:

> "Appellant urges that 'remarries' is a term used in a Federal statute, and that its meaning must be interpreted in the context of that law. While we agree, we do not find a definition of 'remarries' in the statute. 'The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.' *DeSylva* v. *Ballentine* [1956], 351 U.S. 570, 580, 76 S. Ct. 974, 980, 100 L. Ed. 1415". 245 F. 2d 565.

Accordingly, this Court applied California law and, since it decided that the trial court had correctly applied that law, its decision was affirmed.

Here, however, we are not concerned merely with a question of statutory construction concerning a legal status [marriage] that is precisely defined and invariably committed by federal statutes to local law, but with a highly pragmatic issue, involving the interplay of many economic factors and capable of assuming conflicting

shapes and hues. For these reasons, the federal courts have wisely regarded the employee-independent contractor issue as generally one of fact, or as a mixed question of fact and law, reposing in most instances within the reasonable discretion of the administrative agency concerned.

Moreover, in the instant case, unlike the situation in *Pearsall,* the Social Security Act and the regulations thereunder, as quoted above, clearly base the test for determining whether an applicant is an employee or an independent contractor upon the general principles of the common law, rather than upon the law of the state where the services were performed or any other state. And there certainly is a rapidly expanding body of federal law on this question, not only as applied to the Social Security Act but to many other federal statutes as well.

Presumably, in deciding *Pearsall,* the foregoing distinctions were regarded by this Court as so significant that it deemed even a passing glance at *Matcovich* unnecessary.

Finally, Appellant's assumption that the mere existence of a written contract automatically makes the employee-independent contractor question one of law under California jurisprudence is unsound in any event, as shown by our trial Memorandum of Points and Authorities (pp. 19-21) and by California citations herein. There is nothing unusual today in defining the duties and rights of employees by written contracts. In the year 1959, such a contract certainly does not create any presumption that the person hired was an independent contractor, either under federal or local law. The question remains one of fact, unless the respective rights and obligations of the parties are clearly and thoroughly defined by the contract and unless the contract is consistent with the surrounding circumstances and especially with the actual practices

thereunder, so that it may be regarded as embodying the true relationship.

The judicial approach of this Court in *Matcovich v. Anglim* is in harmony with that subsequently employed by the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.* [1944], 322 U. S. 111, which involved the term "employee" in the National Labor Relations Act. The Supreme Court reasoned that said meaning should be determined, not exclusively by reference to common-law standards, local law, or legal classifications for other purposes, but "with regard to the history, context and purpose of the Act and the economic facts of a particular relationship." 322 U. S. 128-129. It then held that the decision of the N.L.R.B. that the newsboys involved were "employees" under the Act may not be set aside on review since it was warranted by the record and had a reasonable basis in the law. 322 U. S. 131-132.

Viewed in any light, it certainly seems unreasonable to contend that the mere fact that the parties purport to define a worker's status by a written contract necessarily or even preferably makes that question one of law. If the contract fully covers the relationship between the parties, if it is clear and definite in its terms, if it is consistent with the nature of the services actually rendered and the manner in which they are performed, then, indeed, the question of the worker's status may properly be considered as essentially legal. However, an employment contract frequently contains ambiguities and diverse elements and it is necessary to study and evaluate them in the light of actual performance in order to resolve the question of status properly.

To take a hypothetical case, a particular applicant for benefits under the Social Security Act might be regarded

as an employee if the Secretary felt that factors A, B, C, and D were, in their cumulative effect, more important than factors E, F, G, and H. That, of course, is essentially a decision of fact, based upon what actually happened between the parties as weighed on the scales of the agency's experience and expertise. In such a situation, a reviewing court is not justified in substituting its own evaluation of these factors for that of the administrator. Any attempt to do so violates the substantial evidence rule and the sound public policy which underlies it. Presumably, this was the primary reason why the experienced trial judge who heard this matter affirmed the decision of the Appellee.

On page 14 of his brief the Appellant contends that "the City could not discharge appellant, and appellant could not quit until the contract was performed." In support of this contention the Appellant cites page 90 of the administrative record. Presumably, his reference is to answer 17 of the "Employment Relationship Questionnaire" submitted to the Secretary of the Board of Public Works of the City of Los Angeles, which answer merely stated that the Appellant was "not an employee—worked as independent contractor." Of course, in view of the aforesaid prohibition in the Charter of the City of Los Angeles, such an answer was to be expected and had to be given consistently in order to permit the Appellant to be paid and in order to avoid any admission that the parties were violating the law. In any event, it does not determine whether or not the Appellant could be discharged during the period of the contract.

Indeed, a close reading of the contract indicates that the City might, in effect, have been able to discharge the plaintiff without cause during the year in question. Para-

graph 4 thereof provides that "Payment shall be made to the Contractor only upon the statement of the Contractor, approved in writing by the President or two members of the Board of Public Works". [R. T. 85].

It does not appear from the context of the contract, or from anything else in the record, whether "statement" as used in said paragraph 4 meant the Appellant's quarterly report as required by paragraph 2 [R. T. 67-83], or merely a voucher for services rendered [R. T. 98]. However, approving a voucher is usually a matter of administrative routine, which would scarcely require the intercession of the President of the Board of Public Works or two members thereof; whereas approval of a detailed report listing the Appellant's activities for a given quarter would be a matter for the executive discretion of the Board. Moreover, unless the quarterly reports were required in order to enable the Board to determine whether the Appellant was performing satisfactorily, they would seem to serve no useful purpose. It is clear from the "List of Activities" attached to said reports [R. T. 68-70; 72-77; 79-83] that the Appellant was working in close association with several administrative supervisors of the City and that much of his work was performed at their request. Since he was not acting "on his own," presumably the City did not need the quarterly reports merely to be informed of the general nature of Appellant's services. Consequently, we believe it more logical to interpret paragraph 4 as meaning that the Board of Public Works had to approve the Appellant's quarterly report before he became entitled to compensation.

Proceeding from the foregoing premise, no standards or criteria for approval were imposed to guide the Board on this matter so that apparently it could deny approval for

any reason sufficient unto itself. Perhaps fraudulent or arbitrary action would have been set aside by the courts, but otherwise it seems that in this respect the Board had even more control over Appellant than the ordinary employer. Although an employer often has an unrestricted right to discharge, at least for unsatisfactory performance, he is, nevertheless, generally obligated to pay for the services rendered to that point. Here, however, it appears that had the Board been dissatisfied with the work of the Appellant in any particular quarter, it could have refused to approve his report or "statement" for that period and thus, subject to the legal restrictions presumed above, have denied him compensation. In any event, this was a peculiar and ambiguous provision and one which would rarely be acceptable to a bona fide independent contractor dealing at arm's length.

Moreover, even if it be conceded, *arguendo,* that the City of Los Angeles had no right to discharge the plaintiff during the period of the contract, that does not necessarily create a question of law which must be resolved in the Appellant's favor. Appellant has quoted the following from *Empire Star Mines Co. v. California Employment Commission* (1946), 28 Cal. 2d 33, 43: "Strong evidence in support of an employment relationship is the right to discharge at will, without cause." Appellant's Brief, p. 8. We concede that this is an important factor. However, it is not necessarily decisive. It may be, and often is, overcome by other criteria to the contrary. See *Royal Indemnity Co. v. Industrial Accident Commission* (1930), 104 C. A. 290, 285 Pac. 912; *Peters v. Cal. Bldg.-Loan Assn.* (1931), 116 C. A. 142, 2 P. 2d 439; *Hartford Accident & Indemnity Co. v. Industrial Accident Commission* (1932), 123 C. A. 151, 10 P. 2d 1035.

In the *Peters* case, *supra,* it was said that the right of discharge is not conclusive evidence negating the independence of a person performing work for another. See also *Batt v. San Diego Sun Publishing Company* (1937), 21 C. A. 2d 439, 69 P. 2d 216, where the court stated:

> "It is true that the right of immediate discharge usually has been held to indicate the existence of master and servant. But this has not always been true (citing California cases, including those above). It is well settled that the contract must be construed as a whole and that all of its provisions must be considered in giving effect to any one of them". 21 C. A. 2d 435.

The court in *Peters* proceeded to rule that plaintiff's decedent was an independent contractor despite the fact that he had been subject to discharge by the defendant employer for unsatisfactory work and that the defendant was the sole arbiter of whether sufficient cause existed.

It is submitted that if the right of discharge does not necessarily prevent a finding that the person performing the work is an independent contractor, the reverse should also be true. The mere fact that such a right does not exist during the period covered by a contract should not be sufficient, in itself, to require a holding that the party involved is an independent contractor. It should not be fatal to the existence of an employer-employee relationship that the parties agreed in writing that during a stated period the employee would not be discharged except under certain conditions. Job protection of this type is a frequent result of collective bargaining between the employer and the representative union. Since the courts certainly would not consider that this was decisive in determining the status of a given worker, why should it be decisive, or

even of major significance, in cases where the worker contracted directly?

Section 3351 of the California Labor Code, enacted in 1937, clearly anticipates the existence of written contracts between employer and employee, as distinguished from earlier days when such contracts were a rarity. Said Section states:

> " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes: . . . (b) all elected and appointed paid public officers".

If, as Appellant seems to imply throughout his brief, the mere existence of a written contract between the parties automatically converts the question whether a particular worker was an employee or independent contractor into a question of law, then the purpose of Congress in attempting to achieve national uniformity, through the harmonious policies and rulings of an administrative agency utilizing its vast experience and knowledge in achieving the statutory goals, would be frustrated. Employment contracts, not uncommon today, will become more frequent in the future. The position taken by the Appellant would eventually result in an assumption by the courts of many of the administrative responsibilities of the Department of Health, Education, and Welfare.

It is anticipated that the Appellant may also argue that even if it be assumed that the written contract here is not decisive, yet since the basic facts pertaining thereto are not in dispute, the ultimate question must be one of law. However, this argument is fallacious since the cases

clearly show that the proper test is not whether both parties agreed upon the basic facts but whether those facts lead so compellingly to a definite conclusion, *i.e.,* that the person concerned is an employee or an independent contractor, as the case may be, that any other result would clearly violate the common-law criteria for the determination of this question. See as to this 57 C. J. S., Section 617 (2), page 411, *et seq.,* and especially the cases cited under notes 49 and 50.

Section 3353 of the California Labor Code defines an "independent contractor" as "any person who enters service for a specified recompense for a specified result, under the control of his principal as to the result of his work and not as to the means by which such result is accomplished." Of course, this merely adopts the common-law concept that the measure of potential control is a primary factor, which is conceded by the Appellee but which leaves the major question unanswered. Appellee wishes to emphasize again, however, that the local law of California cannot be regarded as controlling on this question. Moreover, even if it could be considered decisive, it would sustain the Appellee's position in any event. This is clearly evidenced by the citations and discussion which follow.

The Supreme Court of California has said that where there is no conflict in the evidence, it is the duty of the appellate court to decide as a matter of law what the facts prove. *Hedge v. Williams* (1901), 131 Cal. 455, 63 Pac. 721; *Perkins v. Blauth* (1912), 163 Cal. 782, 127 Pac. 50. However, this broad language must be qualified in the light of its more definitive statements both in the earlier case of *Greenberg v. Western Turf Association* (1905), 148 Cal. 126, 82 Pac. 687, wherein it was said that "when none of the facts are controlling the court should refuse

to direct a verdict," and in the later case of *Robinson v. George* (1940), 16 Cal. 2d 238, 105 P. 2d 914, where it stated that a question of law would be presented *only* "if the terms of the contract are precise and explicit and the evidence is reasonably susceptible of but a single inference." See also *Chapman v. Edwards* (1933), 133 C. A. 72, 24 P. 2d 211, where the California Court of Appeals observed this distinction by declaring that the question whether a person was an employee or an independent contractor *was a question of fact in all cases except where the evidence permits only one reasonable inference.*

In *Frugoli v. Conway* (1950), 95 C. A. 2d 518, 213 P. 2d 76, it was said that if the facts disclose a mixed relation of employment, whether a person is an independent contractor or an employee, is ordinarily a question of fact. "In such cases," said the Court, "the findings of the trial court, if based on substantial and competent evidence, cannot be disturbed on review."

> "If there can be only one reasonable inference from the evidence, the question becomes one of law for the Court—but in most cases it is a mixed question of law and fact and the jury's determination is binding if supported by substantial evidence."
>
> *Graetch v. Dix* (1945), 68 C. A. 2d 155, 156 P. 2d 79.

A California decision concerning a factual pattern somewhat similar to the one herein is that of *Burlingham v. Gray* (1943), 22 Cal. 2d 87, 137 P. 2d 9, wherein it was said that it was not conclusive that the employee is permitted to choose his own time with respect to arriving and leaving, and that he was not directed where to go or to whom to sell. As to this see also 28

Op. Cal. Atty. Gen. 362, wherein it was held that a person who had been appointed city attorney, and who had taken the requisite oath, is a public officer and thus an employee for Social Security purposes even though his service was intermittent and purportedly performed on a contractual basis. An analogous result was reached in 56 Op. Cal. Atty. Gen. 258.

Another California decision which sheds light on the instant problem is *Maaskant v. Matsui, et al.* (1942), 50 C. A. 2d 819, 123 P. 2d 853, wherein the following pertinent comment was made by the Court:

> "The appellants quote numerous excerpts from the testimony which, they assert, show that Matsui was not an employee but an independent contractor . . . appellants then proceed to quote numerous authorities stating well-settled rules as to the distinction between an employee and an independent contractor. It is not necessary to refer to those because the most casual reading of the record shows that the appellants have omitted to refer to testimony which clearly gave the jury the right to infer that the appellant Matsui was an employee of the appellant Hopper and we are, of course, not concerned here with mere conflicts in the testimony". 123 P. 2d 854.

Consequently, under local law, which is essentially the general common law on this question, the fact that the Appellant herein did not follow rigid working hours but had considerable freedom with respect to when and how he worked, would not be decisive.

The facts in the instant case do not compel but one conclusion since they contain diverse elements which would permit reasonable men to differ as to the status of the Appellant. Under such circumstances, the question

is clearly one of fact and, therefore, the decision of the Appellee must be approved if supported by substantial evidence, under the mandate of Section 205(g) of the Social Security Act.

From a review of the authorities it is evident that the question whether a person is an employee or an independent contractor is always a question of fact, even where the basic facts are not in dispute and even where there is a written contract, unless the evidence leads so compellingly to one conclusion that the other would clearly violate the controlling rules of law. Only in the latter case would a trial judge be warranted in directing a verdict or an appellate court in reversing the judgment below.

In recent years, the federal courts have shown an increasing tendency to resolve any doubt as to whether a particular issue is one of fact or law in favor of finding it to be a question of fact. In other words, the judicial tendency has been to allow the administrative agency to decide any particular question wherein the given facts would justify contrary inferences and, thus, contrary ultimate conclusions. For example, in *Magner v. Folsom* (D. C. N. Y., 1957) 153 F. Supp. 610, the district court held that the Secretary's decision that the father of the claimant had not been competent to marry was supported by substantial evidence and, therefore, was conclusive upon the court. Since the competency of a person to marry has generally been regarded as a question of law, the *Magner* case indicates a willingness by the federal courts to narrow that concept in Social Security cases.

From our study of the many federal decisions on this problem, we believe it fair to say that where the constituent elements justify contrary inferences, the issue almost invariably will be considered one of fact.

Federal decisions with respect to statutes somewhat analogous to the Social Security Act likewise show the fallacy of Appellant's contention that the question whether a worker is an employee or an independent contractor is usually one of law. For example, in *Railway Express Agency Inc. v. The Railroad Retirement Board* (C. A. 7, 1958), 250 F. 2d 832, cert. den. 356 U. S. 967, it was held that said Board's finding that, for purposes of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, the Agency's merchant agents were not independent contractors but employees was supported by substantial evidence and must be affirmed. In that case the Seventh Circuit Court of Appeals said that to sustain the decision the reviewing authority need not find that the Board's construction of the law was the only reasonable one or even that it was the result which the Court would have reached independently in judicial proceedings. In accord is *Southern Development Co. v. Railroad Retirement Board* (C. A. 8, 1957), 243 F. 2d 351.

To summarize, it is submitted that the relevant factors herein are sufficiently inconsistent or ambiguous to make the question whether the Appellant was an employee or independent contractor a question of fact, so that the Appellee's decision must be sustained if supported by substantial evidence.

B.

The Appellee's Decision That the Appellant Was an Employee of the City of Los Angeles, Rather Than an Independent Contractor Therewith, Is Supported by Substantial Evidence in the Record and, Therefore, Must Be Affirmed.

In the instant case the Appeals Council, on October 17, 1958, made the following decision:

> "This case is before the Appeals Council upon request of the claimant for review of the referee's decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request For Review is hereby denied".

Thus, the Appeals Council adopted and affirmed the decision of the referee that the Appellant was an employee of the City of Los Angeles, and, as such, was not entitled to the benefits claimed under the Social Security Act. Its action became the "final" administrative decision of the Secretary of Health, Education and Welfare, from which an appeal may be taken to this court only under the restrictive provisions of the Social Security Act, Secs. 205(b), (g); 42 U. S. C. A. 405(b), (g).

The record indicates that the requirements of due process were fully satisfied and, indeed, the plaintiff has made no objection on that score.

The essential findings of the referee are as follows:

> "* * * the referee finds claimant was engaged as an employee by the City of Los Angeles within the meaning of the Act during the period in issue. It is apparent that he was engaged to continue working for the city because of his intimate knowledge

of the procedures and operations of the Bureau and the Board of Public Works, rather than because of his general knowledge as a professional consultant who seeks work as an independent contractor. His new work involved the same subject matter on which he had previously worked and included substantially the same duties. Although he was relieved of his supervisory duties for the Bureau, he, nevertheless, indirectly participated in these duties by frequently consulting with his successor concerning them. Also his new duty involving consultations with city officials, other than and in addition to those with whom he had previously consulted, was not substantially different from his former work. It, in effect, served to relieve members of the Board of Public Works from performing this task as they had previously done after being briefed by claimant.

"The city furnished all the facilities necessary for the performance of his work except for an automobile for the use of which he was reimbursed by the city. He was required to perform his services personally and did not have helpers. He was subject to assignments by the Board of Public Works to inspect specific jobs and report his recommendations. The city had first call on his services but, apparently, would not object if he worked for others as long as it did not interfere with his city work. He worked practically full time for the city and did not hold himself out as available to perform services for others, nor did he seek such work. Although it appears that he was not supervised in the performance of his work and that his working time was not regulated, he, nevertheless, was required to report periodically to the Board of Public Works and to obtain its ap-

proval of his services performed before becoming entitled to compensation. This indicates that the city retained a substantial measure of control over his services. Moreover, his long experience and proficiency on the job could readily account for the unregulated manner in which he was permitted to perform his work.

"Thus, it appears that this is not the type of case in which an individual is engaged in the independent business of rendering advisory consultant services from time to time on a subject-to-call basis, or that the work which he was regularly called upon to perform was of a nature which would require the services of one usually engaged in an independent calling or profession. It appears rather that his services were in a real sense integrated in the work of the city and constituted a definite part of the work of the Bureau and the Board of Public Works, which are charged with the responsibility to maintain and repair the city streets. It further appears that the work performed by claimant could have been handled by a regular employee of the city. Although a considerable amount of experience and ability was necessary in the performance of his services, it was no greater than previously required of him. To a large extent his activities appear to have promoted the interests of the city in much the same manner as his services prior to 'retirement'. Furthermore, claimant's compensation did not depend upon the completion of a specified amount of work or the accomplishment of a prescribed result. He was paid a fixed amount like any other employee, with no opportunity to make a profit or suffer a loss under his arrangement.

The fact that the city charter forbid the re-employment of retired employees as employees does not, *per se,* establish a relationship of an independent contractor if, in fact, the relationship between claimant and the city was one of employer and employee within the meaning of the Act. Thus, in *Matcovich v. Anglim,* 134 F. 2d 834 (C. A. 9), the court held that a local law (California Unemployment Reserves Act) which stated that a dance hall proprietor who employed taxi dancers was not their 'employer' and a state court decision to the same effect, were not controlling in determining whether the proprietor was an 'employer' within the meaning of the Social Security Act, and that the status of the dance hall proprietor as an 'employer' was to be determined under applicable common-law principles.

"The referee, therefore, finds that notwithstanding the city's charter provisions and claimant's designation in the contract as a contractor, the entire factual circumstances indicate that his services were those of an 'employee' within the meaning of section 210(k)(2) of the Act, and concludes that claimant was an employee of the city within the meaning of the Act, engaged in noncovered employment which did not qualify him to be credited with any of the claimed quarters of coverage.

"Accordingly, it is the decision of the referee that claimant is not entitled to the old-age insurance benefits for which he made application". [R. T. 8-9].

The basic issue of fact in this case is whether Appellant has the necessary "quarters of coverage" for a fully insured status entitling him to old-age insurance benefits.

Appellant has conceded that the resolution of this issue depends upon whether the income derived from his work as a "consultant" to the City of Los Angeles constituted earnings from self-employment or represented wages received as an employee of the City, within the meaning of the Social Security Act. If said income is found not to be earnings from self-employment, then it must be income from non-covered employment, so that Appellant would lack the necessary "quarters of coverage" to entitle him to the benefits he has claimed.

On pages 11 through 15 of his brief the Appellant has listed many factors which, he contends, show that he was an independent contractor. Many of these factors are obviously repetitious or inconsequential, and some are not in accord with the evidence. For example, the Appellant argues under item 12 on page 12 of his brief that "No one had ever been employed by the City Council as an employee of the city to perform the work called for under appellant's contract", disregarding the undeniable facts that the contract was signed before the Appellant retired as an employee and that he, himself, admitted that his services under the contract involved, to a large extent, the same duties he had performed hitherto [R. T. 24, 28]; that his work was integrated with the routine work of the Bureau of Street Maintenance and that his duties could have been performed by a regular employee [R. T. 28, 34-35]; and that a study of the actual work performed by the Appellant, as itemized in his quarterly reports, indicates that nearly all of his services involved routine operations which would normally be performed by an employee and not by an expert "consultant", as the Appellant claims to have been [R. T. 67-83; Appellee's trial Supplemental Memorandum of Points and Authorities, 3-5].

A study of these activities reveals on its fact that the Appellant's contention, under item 27 on page 13 of his brief, that "A review of the list of activities performed by appellant under the contract as set out at Reporter's Transcript, page 68, *et seq.* of the transcript shows that the work is the type that a consultant and independent contractor would perform" is simply not true. The functions performed were invariably those which any experienced supervisor of the Bureau of Street Maintenance would ordinarily assume.

Again, the Appellant contends, under item 16 on page 12 of his brief, that "He was furnished no regular secretary and no private office by the City", and he cites pages 31-32 of the record in support of this contention. However, Appellant's testimony on said pages shows that he was furnished office space, although he shared it with others, and that secretarial services were made available to him, although not on an exclusive basis. In other words, Appellant worked under the same conditions as do thousands of governmental employees who, in no sense of the word, can be regarded as independent contractors.

Again, Appellant contends, under item 18 on page 12 of his brief, that his compensation "was not dependent on the amount or kind of work which was done; he was paid a specified sum for a specified result". However, as shown above, the contract seems to have made it a condition of compensation that Appellant's quarterly report be approved by the Board; at least it permits a reasonable inference that, in the absence of such approval, the Appellant's services would have been terminated. Moreover, it is difficult to see how he was paid for a "specified result" when his duties were clearly not defined in detail by the contract or, indeed, by any subsequent directive in the record and when their actual performance showed

a great variety of unrelated functions, almost entirely of a routine nature and devoid of any systematic pattern.

However, even if it be assumed, *arguendo,* that the factors so listed by Appellant constitute "substantial evidence" that he was an independent contractor, it is equally evident that other factors in the record, when weighed together, support a contrary conclusion just as strongly, if not more so. As to this, reference is made to pages 22 through 24 of the Appellee's trial Memorandum of Points and Authorities, whereon the relevant factors, pro and con, are listed in columnar juxtaposition.

The factors which support the decision of the Appellee may be restated as follows:

(a) The Los Angeles City Charter prohibited the rehiring of the Appellant as an employee, which under the peculiar circumstances involved herein would justify an inference that the contract was merely a device to circumvent it [R. T. 11-13, 84-86];

(b) The terms of the contract [R. T. 84-86] favor the employer-employee theory for these reasons:

(1) It is a vague and terse document which fails adequately to define the Appellant's duties;

(2) Appellant's duties are subject to control by the Board of Public Works since he agreed to furnish investigative reports on "any other matters which may be determined and specified by the Board of Public Works" [R. T. 84];

(3) The agreement ran for one year and provided a yearly salary divided into four equal quarterly installments, regardless of the number and type of reports submitted except that at least one report was required for each quarter [R. T. 85];

(c) Appellant was retiring as an employee but the contract was signed while he was still employed and his services under the contract involved essentially the same duties he had performed hitherto [R. T. 24, 28];

(d) Appellant was subject to assignment by the Board of Public Works to inspect designated jobs and to report to the Board [R. T. 35];

(e) The City had first call on Appellant's services. He worked practically full time (4 days a week, from 9 a. m. to 3:30 p. m.) and he did not seek other work [R. T. 31-32, 41];

(f) Although Appellant was required to report to the Board of Public Works each quarter, his compensation was not dependent upon the quantity or quality of his reports [R. T. 33, 85];

(g) The City furnished Appellant all facilities, including office and office supplies, except that Appellant provided his own automobile, for which he received a mileage allowance [R. T. 31-33, 85-86];

(h) Appellant's work was integrated with the routine work of the Bureau of Street Maintenance and his duties could have been performed by regular employee [R. T. 28, 34-35].

No doubt, other elements, pro or con, can be found in the record, but the above are sufficient to indicate that the evidence presented to the referee and the Appeals Council raised a genuine question of fact.

Moreover, the Appellee does not have the burden of proving that a person who seeks a benefit under the Social Security Act is not entitled thereto. That burden

must always be borne by the claimant and it does not shift from him after litigation has commenced. Although the Appellee does not consider himself to be, and does not act as, an adversary of any claimant for benefits under the Act, he cannot allow a claim where the evidence does not affirmatively establish that the prescribed conditions of eligibility have been met. Granting that there is no specific provision of the Act with respect to the burden of proof on employee-or-contractor questions, there is language with respect to other types of claim which expressly places the burden of proof upon the claimant. For example, both Section 216(i)(1) of the Act [42 U. S. C. A. 416(i)(1)] relative to "period of disability", and Section 223(c)(2) [42 U. S. C. A. 423(c)(2)] relative to "disability benefits" state that "An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required".

Moreover, apart from the context of the Act, it is well-settled that, absent clear statutory language to the contrary, the burden rests upon one who files a claim with an administrative agency to establish that the required conditions of eligibility have been met. See *Norment v. Hobby* (N. D. Ala. 1953), 124 F. Supp. 489, and *Thurston v. Hobby* (W. D. Mo. 1955), 133 F. Supp. 205, both of which actions concerned Section 205(g) of the Social Security Act. See also *Eschbach v. Contractors, Pacific Naval Air Bases* (7 Cir. 1950), 181 F. 2d 860; *Ashford v. Appeal Board* (1950), 238 Mich. 428, 43 N. W. 2d 918; and *Department of Industrial Relations of the State of Alabama v. Tomlinson* (1948), 251 Ala. 144, 36 So. 2d 496, in which last case the Alabama Supreme Court held, and cited a number of decisions by courts of other states so holding, that a claimant under a state

unemployment compensation law has the burden of proving his right to benefits, and that "the claimant assumes the risk of non-persuasion".

On the foregoing record, it is submitted that even without the controlling statutory restriction in this case, the general principles of judicial review would require this court to affirm the decision of the Appellee. *A fortiori,* in view of the mandate of Section 205(g) of the Act that the factual findings of the Administrator must be approved if supported by substantial evidence, it would be improper for this Court to substitute its own judgment.

Such a conclusion is especially compelled in this case because of the fact that the Appellant had spent nearly fifty years in the service of the City of Los Angeles and presumably had the most influential "connections". Although the trial judge disclaimed any finding that the contract between Appellant and the City was a subterfuge, or was designed to circumvent the provisions of the charter, certainly he would have been thoroughly justified in viewing the transaction with a skeptical eye, and certainly this Court may conclude that the contract falls far short of telling the whole story.

In further support of Appellee's argument that the contract between the Appellant and the City of Los Angeles did not embody or reflect the real relationship between the parties thereto (see Appellee's Memorandum of Points and Authorities, pages 13-17, 26-28), the Court's attention is respectfully directed to the facts and comment below.

It is a rather remarkable coincidence that the Appellant's imminent retirement coincided so conveniently with the realization of the Board of Public Works that "there has long been a need for improvement of present pro-

cedures in connection with lot cleaning and repair and maintenance of public streets". [R. T. 87].

The chronology of municipal action reveals that, having received a request from the Board of Public Works for authority to contract with the Appellant in order to meet said alleged need, the Finance Committee of the City Council recommended at the latter's meeting of February 9, 1955:

> "that the board of Public Works be authorized to enter into a contract with Louis Miller, as an independent contractor, for investigating, advising and reporting on new and improved methods of lot cleaning, street repairs, equipment selection and use, and such other subjects as may be specified by said Board, and that the City Attorney be instructed to prepare such contract pursuant to specifications of the Board of Public Works.
>
> "We Further Recommend that Subject To The Approval of The Mayor, the sum of $6400 be appropriated from the Unappropriated Balance to the Contractual Services Account, Bureau of Street Maintenance Fund, in payment for the services to be contracted for".

Said recommendation was unanimously approved by the Council under a suspension of the rules at the same session, *without any discussion whatever*. [Minutes, Los Angeles City Council, Vol. 398, pp. 540-541; we understand there is no available public record of the proceedings before either the Board of Public Works or the Finance Committee of the City Council]. On February 17, the Mayor filed with the City Clerk a letter of concurrence dated February 14, and on the same filing day the City Clerk notified the interested departmental officers. [R. T. 87].

Thereafter, a contract was prepared, presumably by or with the approval of the City Attorney, which was signed by the parties on February 23, to be effective on the day following the plaintiff's compulsory retirement on February 28. [R. T. 24, 84] All this certainly constituted remarkably rapid action by the several municipal agencies involved.

Although the reason advanced by the Board of Public Works for the execution of said contract was a "need for the improvement of present procedures", the Appellant presented no evidence at said hearing, either orally or by documentation, to show that his services under the contract contributed anything to such improvement. The record does not warrant even an inference that he made any substantial proposal for changing the established method of doing things. There is no testimony to this effect in the transcript of hearing. [R. T. 18-41] The appellant's quarterly reports, [R. T. 6-83] are virtually devoid of any entry or comment which suggests that he submitted any recommendation "for the improvement of present procedures". Indeed, the three letters to the Board of Public Works which accompany the reports [R. T. 67, 71, 78] are couched in virtually identical language, and the paragraph therein which discusses the content of the reports is exactly the same in all three letters. Said paragraph reads as follows:

> "Attached you will find a list with a brief description of the investigations made at the request of Board members and other public officials with special attention to recommendations relative to the replacing of pavement, construction of storm drains, sewer trenches, water drainage, general street repairs, estimates on proposed projects and projects

contemplated, details on lot cleaning, and consultation preceding and during conferences on various subjects". [R. T. 67, 71, 78].

Surely, recommendations concerning the replacement of pavement, etc., do not concern the "improvement of present procedures" and do not support the Appellant's position that he was primarily an independent consultant. Nearly all of the foregoing is routine maintenance and nothing more.

Finally, reference to the monthly reports themselves shows nothing but routine entries, with one possible exception. Typical of these entries are the following:

"8/23/55 Attended meeting in Commissioner McCann's office regarding Eldridge Avenue N/o Sayre St. [R. T. 69].

11/8/55 Conferred with Superintendent Lauer of Street Maintenance regarding the construction of sidewalks in Erwin Street and Haskell Avenue. [R. T. 72]

12/12/55 Checking complaint regarding drainage, 103rd and Central. [R. T. 74]

3/29/56 Investigated condition of Exposition Boulevard west of Crenshaw Boulevard and conferred with Street Maintenance. [R. T. 80]

6/25/56 Conferred with Judge Marchetti regarding sunken curb in front of his property located at 8428 Carlton Way". [R. T. 83]

The possible exception mentioned above concerns an entry dated 8-24-55 as follows: "Met with C. Beardley, Hugo Winter, and Paul Wright at Shoup Avenue and Frair Street regarding the use of a new select material

for sub-grade". [R. T. 69] This is the only entry found which uses any language to indicate that the Appellant did anything, or proposed anything, which constituted a departure from routine methods. Moreover, the Appellant may be credited with this proposal only by inference since it might have emanated from either of the other two persons mentioned or even from an outside source. This is an exceedingly flimsy peg upon which to hang a conclusion that the Appellant was actually hired as a consultant to recommend improvements in "present procedures".

All things considered, the decision of the Appellee that the Appellant was an employee rather than an independent contractor is amply supported by the evidence in the record and the reasonable inferences therefrom. Therefore, it was properly sustained by the trial court.

C.

Even Assuming, Arguendo, That Said Question Is Essentially One of Law, Appellee's Decision That the Appellant Was an Employee of the City of Los Angeles Is Legally Sound and, Therefore, Should Be Affirmed.

If we make the untenable assumption, merely for the sake of argument, that the question of Appellant's status is one of law, it is submitted that, even so, the decision of the Appellee should be affirmed. It is a debatable question, to be sure, with diverse elements, as listed above, but the overriding factor is that the surrounding circumstances favor a conclusion that the written contract did not embody the real relationship between the parties.

Since the contract was vague and indefinite, recourse must be had to the underlying conditions and to the manner of performance in order to ascertain the true intent

of the parties. These factors have been adequately discussed above and, weighed together, they tilt the scales in favor of the Appellee's decision.

It is especially significant that the contract was signed about five days before the Appellant retired [R. T. 22, 24, 84] and that presumably the negotiations which proceeded it were initiated at a much earlier date. No doubt, the Appellant had been a valuable and conscientious municipal employee and the desire of his superiors to retain him is understandable—but that is all the more reason, of course, why this Court, were it to apply its own judgment, should peer behind the facade and survey the actual structure.

It is elementary that mere nomenclature in a contract does not conclusively establish a person's status but that a court must look behind it to the entire context and, where ambiguity exists, to the surrounding circumstances in order to ascertain the true intent of the parties.

The contract here in question provided for an over-all yearly salary of $6400, payable in four equal installments of $1600. Although the Appellant was required to submit at least one report each quarter, the contract was silent as to what such reports should contain and how they should be formulated. Moreover, it is uncertain whether such a report had to be approved by the Board of Public Works before the Appellant became entitled to his quarterly payment. The contract merely stated that "payment shall be made to the Contractor only upon the *statement* of the Contractor, approved in writing by the president, or two members, of the Board of Public Works". (emphasis supplied) [R. T. 85] Appellant interprets this ambiguous language as meaning that all he had to do was to submit a voucher, or a mere state-

ment that he had been on the job for the four months and had submitted a detailed report on his activities, as shown by his testimony on page 33 of the administrative record as follows:

> "Q. Was your compensation dependent in any way upon amount and kind of work you described in your statements? A. No, it was not because the contract listed there that I was to receive money, and it did not state any addition. The only addition I received was a contract which was also authorized. There was mileage, any mileage that I drove". [R. T. 33]

As explained above, we consider that a contrary interpretation, to the effect that this provision gave the Board of Public Works the right to discharge the Appellant by refusing to approve his quarterly report, as more logical and as completely consistent with the theory that he was an employee. But for argument's sake, let us accept the Appellant's version.

If the Appellant actually was an independent contractor, this was a very peculiar arrangement. Under his own interpretation, it follows that he was hired to prepare investigative reports but that he was paid without regard for the quantity, quality or form of those reports, on a basis which guaranteed him a stated yearly salary so long as he provided at least one undefined "report" every four months. It may seriously be doubted that the corporation counsel of Los Angeles would ever approve such a vague contract in a normal situation. The only explanation that makes sense under the Appellant's theory is that this was a "family" arrangement by parties who understood and trusted each other for the purpose of continuing a desirable relationship by circumventing certain legal obstacles.

Here it means little that a written contract had been executed. In view of the prohibition of the Charter, some formal designation of the Appellant as a "Contractor" was imperative. It also means little that Appellant was not required to be on duty during specified hours. It was understood, tacitly or otherwise, that he would do enough work to fill the need for his knowledge and experience. Viewing these circumstances in conjunction with the many other factors, as listed and discussed above, which affirmatively support a conclusion that the Appellant was an "employee", it is evident that the decision of the Appellee is legally sound and should be affirmed.

It is also a firmly-established rule that while a conclusion of law by the Secretary of Health, Education, and Welfare is not binding on a district court, it is entitled to great weight because of the agency's specialized knowledge.

Fuller v. Folsom (D. C. Ark. 1957), 155 F. Supp. 348;

acc. *Dunn v. Folsom* (W. D. Ark. 1958), 166 F. Supp. 44;

See also:

Folsom v. Pearsall (C. A. 9, 1957), 245 F. 2d 562, 564.

On page 10 of his brief, the Appellant asks a rhetorical question: "Would the City of Los Angeles be liable to third persons under the doctrine of *respondeat superior* for the negligence of appellant in carrying out the terms of his contract?" And he answers: "It is inconceivable that anyone could successfully hold the City liable for the acts of appellant in performing under the contract".

A better answer to said question is that it is irrelevant, since the local rules which govern the doctrine of *respondeat superior* are certainly not controlling with respect to whether the Appellant was an employee or an independent contractor under the Social Security Act. *Matcovich v. Anglim* (9 Cir. 1943), 134 F. 2d 834. The real question in this case is whether, in view of the context and purposes of the Social Security Act, as illuminated by the administrative rulings and practices thereunder which have been impliedly sanctioned by Congress since the passage of the Act, a finding that the Appellant was an employee is supported by substantial evidence. Whether he was enough of an employee to satisfy the California doctrine of *respondeat superior* is absolutely immaterial.

However, in view of the California decisions which we have cited above, we believe that a strong case can be made under local law for an affirmative answer and that Appellant's contention that it would be "inconceivable" is a gross exaggeration.

Continuing to view, for the sake of argument, the ultimate question herein as one of law, it is clear in any event, from the context of the Social Security Act and the relevant regulations thereunder, and from a great number of judicial decisions, that the general principles of the common law, as interpreted in the federal courts, that is federal common law, rather than local law, must determine whether the Appellant was an employee or an independent contractor.

The Social Security Act, as originally enacted, did not contain a definition of the term "employee". Regulations promulgated by the Internal Revenue Service (then Bureau of Internal Revenue) and the Department of Health,

Education, and Welfare (then the Social Security Board; later the Federal Security Agency), incorporated a test for determining the employer-employee relationship, based upon the usual common-law rules whereunder the right of a person to exercise control over the individual performing services for such person is the primary factor for consideration. Thus, Regulation No. 2 of the Social Security Board, promulgated in 1939, stated in article 3:

> "*Service as an employee.*—The relationship between the person for whom services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an

> independent contractor. An individual performing services as an independent contractor is not as to such services an employee".

This definition has been retained without change in each subsequent revision of the Department's regulation (see Regulations No. 3, section 403.804, 20 CFR, part 403; Regulations No. 4, section 404.1004(c), 20 CFR, part 404).

These regulations have been recognized and upheld repeatedly as stating a proper rule for determining the employer-employee relationship for social security purposes. See *Texas Company v. Higgins* (2 Cir. 1941), 118 F. 2d 636. In *Jones v. Woodson* (10 Cir. 1941), 121 F. 2d 176, the court expressly stated that questions of employment relationships under the Act must be determined on the basis of common-law rules and that the regulations provide a test of such relationships based upon such rules. The court said:

> "It must be presumed that Congress was cognizant of these well-established principles at the time of the enactment of the statute, and if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the Act or its legislative history which indicates such an intent. Furthermore, the regulation adverted to blueprints with meticulous care the elements of the relationship in strict harmony with uniform judicial pronouncements. Congress has convened several times since the regulation was promulgated and has not evidenced its disapproval in any manner. That acquiescence must be construed as approval . . .".

In 1947 the Supreme Court in *United States v. Silk,* 331 U. S. 704, 67 S. Ct. 1463, applied a somewhat different but still a single, federal test for determining the existence of employer-employee relationships, setting forth factors designed to explore the "economic reality" of the relationship between the parties, which include the "control test" in the regulations of the Treasury Department and the instant agency. Thereafter, in 1948 the Congress amended the Social Security Act to define the term "employee" therein for the first time. Under this amendment, included in Public Law 642, 80th Congress, 2d Session, the term "employee" was defined in section 1101(a)(6) of the Act as follows:

> "The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules".

Under the provisions of the Social Security Amendments of 1950, the common-law definition of the term "employee" was placed in section 210(k)(2) of the Act, 42 U. S. C. A. 410(k)(2), which has been quoted and discussed above. The effect of this amendment was considered in *Benson v. Social Security Board* (10 Cir., 1949), 172 F. 2d 682, wherein the court stated with respect to the statutory definition:

> "While it is not necessary to explore the full effect of this enactment in the determination of the existence of employer-employee relationships arising in the future, we think it can fairly be said that the intent of Congress was to say that in determin-

> ing in a given case whether under the Social Security Act such a relationship exists, the common-law elements of such a relationship, as recognized and applied by the courts generally at the time of passage of the Act, were the standard to be used . . .".

See also in connection with the statutory definition of the term "employee", *Party Cab Company v. United States* (7 Cir. 1949), 172 F. 2d 87.

The subsequent amendments to the Social Security Act have left unchanged the definition of the term "employee" as adopted by the 80th Congress in Public Law 642, although the definition was expanded in the Social Security Amendments of 1950 to include within its scope categories of individuals who were not employees under the usual common-law rules.

The federal courts, which have stated that the common-law rules apply under the federal statute, have also repeatedly declared that determinations of the employment relationship for purposes of the Act must be governed by federal standards and not by the rules established in local jurisdictions. The Fifth Circuit, as early as 1943, declared in *American Oil Company v. Fly,* 135 F. 2d 491:

> "The Social Security Act operates uniformly throughout the United States, and under like conditions of employment the tax ought to be paid in every State uncontrolled by local decisions as to what relation is created by the contract".

It is submitted that even if it be assumed that the question whether Appellant was an employee or an independent contractor is one of law, the decision of the Appellee is in accord with the overwhelming weight of federal authority, as shown by numerous citations above, and, therefore, should be sustained by this Court.

V.

Conclusion.

In view of the foregoing principles and precedents, it is respectfully submitted that the judgment of the trial court herein should be affirmed.

DATED: This 7th day of December, 1959.

Respectfully submitted,

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